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Written statement* submitted by International NGO Forum on Indonesian Development, a non-governmental organization in special consultative status

The Secretary-General has received the following written statement which is circulated in accordance with Economic and Social Council resolution 1996/31.

[24 June 2015]

* This written statement is issued, unedited, in the language(s) received from the submitting non-governmental organization(s).

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We, the undersigning of this statement, are Coalition of Indonesian Civil Society. We are submitting our position into the first session of Open-Ended Intergovernmental Working Group (OEIWG) on proposed work on internationally legally binding instrument on transnational corporations and other business enterprises with respect to human rights:

We welcomes the resolution of UN Human Rights Council of A/HRC/RES/26/9, 14 July 2015 which put the foundation of "internationally legally binding" on entities and operations of transnational corporation and other business enterprises with respect to human rights. We take a very strong attention and dedication to the process, and to the development of such instrument.

We are looking forward for this OEIWG to work and to involve organizations, rights groups, and those who are burdened by the adverse impact from transnational corporations and other business enterprises.

Fundamentally, we see the basis into legitimacy of such instruments. Those are:

1. The existing The Guiding Principles on Business and Human Rights is voluntary in nature, and limited in its norm and legality on putting the accountability of TNCs and other business enterprises with respect to human rights. Furthermore, there are not mechanism where victims of, survivors of, and the affected of the abuses of TNCs and other business enterprises.

2. Global economy is, in fact, expansion and deepening of legality and operation of TNCs and other business enterprises. This is predominantly facilitated by national governments by means of international treaties. Mostly this is developed by abusing human rights promotion and protection. State has obligation to develop legal framework for promotion and protection of human rights. This very obligation is overruled by treaties of trade and investment arising mostly from WTO (World Trade Organization), free trade agreements, bilateral investment treaties. The assessment of Baseline Studies Business and Human Rights in ASEAN (2013) explains that such treaties and agreements is eroding state's regulatory space.

3. Free trade agreement and bilateral investment treaties keep on upholding the assumption of opening market access to facilitate TNCs and other business enterprises, and imposing the rule where state is in fact tools for such access. Effectively, such agreement and treaties, including the mechanism of Investor-state Dispute Settlement (ISDS) are dismantling the state obligation for promotion and protection of human rights.

4. The ethical basis of states implies the protection of citizens from direct and indirect harm from transnational abuse. The ethical basis, enshrined in constitutional foundation of UN member states, including, Indonesia is deliberately pushed out by primacy and legality of TNCs and business enterprises. Those primacy and legality are dismantling this ethical basis.

5. The dismantling of state obligation is in fact the heart of practices of transnational trade and investment, especially those who are stated in free trade agreement. This further facilitates the proliferation and transnationalisation of TNCs and other business enterprises. Effectively, this expands the legal power of TNCs and other business enterprises.

6. The proliferation and expansion of legal power increases abuses in respect to human rights. Those grow and prolong practices of impunity and irresponsibility. In fact, such abuses are blurred by different false justifications and public-relations works. Those abuses should have been punitive by state obligation on promotion and protection of human rights.

To those basis, it is important to strengthen state obligation, and to put TNCs and other business enterprises into international law and governance with respect to human rights.

Into the legally binding instruments, we reiterate the foundation of basic human rights norms:

1. Standard-setting

The purpose of instrument is of standard setting. This will start with minimum requirement and progressively developed.

2. Non-discrimination

The instruments will identify discriminations created by free-reign transnational corporations and (transnational) business enterprises. The term discrimination is already established by United Nations where it denote:

"...should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms"

This also could reach point where it applies to "thematic" human rights, such as on water, as follow
"Non-discrimination: Water and water facilities and services must be accessible to all, including the most vulnerable or marginalized sections of the population, in law and in fact, without discrimination on any of the prohibited grounds"

Progressively, this will also cover where transnational corporations and (transnational) business enterprises impact their entity and operation upon individual and collective setting of rights and physical human being. This will see how far the entity and operation, directly and indirectly, create and effecting human rights abuses.

3. State-obligation

State should willingly and ably perform their duty to promote and protect human rights. Within the framework of Vienna Convention on Law on Treaties, state should develop an international framework for national and extraterritorial obligation.

4. Mechanism

International mechanism is set into governing transnational corporations and other business enterprises with respect to human rights. This should put the mechanism as accountability mechanism, and, when necessary, asking the full responsibility of home state of TNCs and business enterprises.

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